STATE OF MICHIGAN

COURT OF APPEALS

MARIE WATT, Personal Representative of the Estate of JOHN WATT, Deceased,

Plaintiff-Appellant,

v

CHARLES HETH, D.O., , and PREFERRED FAMILY MEDICINE, P.C., f/k/a WASHINGTON SQUARE CLINIC, P.C.,

Defendants-Appellees.

UNPUBLISHED
February 3, 2005

No. 245910
Oakland Circuit Court
LC No. 02-038082-NH

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

In this wrongful death action, the personal representative of the estate of the decedent filed suit against defendants, alleging that the breach of duty to provide appropriate medical care caused the decedent's cardiac disease to proceed without diagnosis and treatment and ultimately caused his death. Defendants filed a motion for summary disposition, alleging that the statute of repose barred the litigation, and the trial court agreed. Plaintiff appeals as of right, and we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The decedent, a fifty-one year old male, died on July 3, 1999. The certificate of death concluded that the immediate cause of death was a myocardial infarction with coronary artery disease listed as an underlying cause. The decedent was treated by defendant doctor, Charles Heth, at defendant medical clinic from 1992 to 1996. In November and December 1999, notices of intent to file suit against defendants were mailed. These notices indicated that the decedent was a smoker and a drinker with a family history of cardiac problems; specifically, the decedent's mother had died from a cardiac arrest. The notices also alleged that the decedent had a history of hypertension. Despite these factors, it was alleged that defendants failed to conduct the appropriate "work up" for possible coronary artery disease. The notices further alleged that the decedent discontinued treatment with defendants after he left the area to move north, where he was treated by Dr. Thomas Clouse at the Northpoint Clinic in Roscommon, Michigan, from July 1996, until his death in July 1999. Plaintiff was appointed the personal representative of decedent's estate on January 2, 2001, and letters of authority were issued on that date. The complaint was filed on February 5, 2002.

Defendants moved for summary disposition of the complaint on the basis of MCR 2.116(C)(7). Specifically, defendants alleged that the statute of limitations addressing medical malpractice actions provided for a two-year period from the date of accrual of the malpractice or six months from the date of discovery of the malpractice. However, defendants further alleged that the statute at issue also contained a statute of repose that precluded any claim filed six years after the date of the act or omission. In response, plaintiff asserted that summary disposition was inappropriate because "every treatment date constitute[d] the accrual date for a new cause of action under MCLA 600.5838(1)." Plaintiff also asserted that the litigation was timely filed on the basis of MCL 600.5852 because the lawsuit was commenced within two years of the date of issuance of the letters of authority. The trial court granted the motion for summary disposition in a written opinion, concluding:

> Defendants argue that the cause of action arose on December 11, 1992, and that all subsequent treatment did not constitute new acts of alleged negligence. Plaintiff avers that each visit presented new opportunities for Defendants to commit malpractice. The Defendant, Dr. Heth last saw the Decedent, on December 18, 1995. Whether this Court agrees with the Plaintiff's argument regarding a "visit by visit" approach, the statutory deadline as to claims asserted against Dr. Heth expired no later that [sic] December 18, 2001. The cause of action was not commenced until February 5, 2002. Similarly, the statute of repose expired as to any treatment rendered by the professional corporation before February 5, 1996. It is for the foregoing reasons that the Motion is granted.

Plaintiff now appeals as of right, contending that the "six year limitation" provision as applied to medical malpractice claims is incorporated into the wrongful death savings statute, MCL 600.5852. We note that the issue, as pleaded by plaintiff, is not preserved for appellate review because it was not decided by the trial court. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003).

II. APPLICABLE STANDARDS OF REVIEW

We review summary disposition decisions de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in support of and in opposition to a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent, the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning and further judicial construction is neither

permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

III. APPLICABLE STATUTES

Generally, a plaintiff in a medical malpractice case must bring a claim within two years of the claim's accrual or within six months of the discovery of the claim:

> Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice. [MCL 600.5805(6).]
>
> (1) For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. …
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> * * *
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> (2) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 or 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. … [MCL 600.5838a(1), (2).]

On October 1, 1986, an accrual provision regarding medical malpractice claims was established. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219-220; 561 NW2d 843 (1997). It provides that medical malpractice claims accrue "at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1); *Solowy*, *supra* at 220. Thus, while the two-year statute of limitation commences at the time of the act or omission, the six-month discovery rule of MCL 600.5838a(2) begins to run when the plaintiff, on the basis of objective facts, becomes aware of a possible cause of action. *Solowy*, *supra* at 232. Awareness of a possible cause of action occurs when the plaintiffs learns of an injury and a possible causal nexus between the injury and the act or omission of the treating doctor. *Id*. The plaintiff bears the burden of proof of establishing that, as a result of physical discomfort, appearance, condition, or otherwise, that he could not have discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period. MCL 600.5838a(2); *Solowy supra* at 231.

A statute of limitation is a procedural device intended to promote judicial economy by protecting the rights of defendants to be free from a plaintiff who delays bringing an action to

acquire an advantage over an unsuspecting defendant. *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). On the contrary, a statute of repose operates to prevent a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed. *Sills v Oakland General Hosp*, 220 Mich App 303, 308; 559 NW2d 348 (1996). Unlike a statute of limitations, the statute of repose "may bar a claim before an injury or damage occurs." *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 513 n 3; 573 NW2d 611 (1998). However, both the statute of limitations and statute of repose are designed to prevent stale claims and provide relief to defendants from the protracted fear of litigation. *Id*. at 515. It is within the Legislature's power to determine that a cause of action cannot arise unless it accrues within a specific period. *Sills, supra* at 312. MCL 600.5838a(2) contains both a statute of limitations and repose:

> [I]t prescribes the time limit in which a plaintiff who is injured within the statutory period must bring suit and also prevents a plaintiff from bringing suit if she sustained an injury outside the statutory period. [*Sills, supra* at 308.]

IV. ANALYSIS

As an initial matter, we note that plaintiff concludes that each treatment date by defendants constituted the accrual date for a new cause of action and concludes that the discovery date for purposes of the discovery rule is the date of death. As previously stated, the rules regarding summary disposition require that the moving party support its entitlement to summary disposition. *Quinto, supra*. Once the moving party brings forth documentary evidence to support its claim to summary disposition, the nonmoving party must present documentary evidence to establish the existence of a material fact. *Id*. Additionally, in a medical malpractice action invoking the six-month discovery rule, the plaintiff bears the burden of proof to establish that, as a result of physical discomfort, appearance, condition, or otherwise, that he could not have discovered the existence of the claim at least six months before the expiration of the statutory period. *Solowy, supra*. Based upon the medical documentation submitted by defendants in this litigation, plaintiff failed to meet the burden of proof.

According to medical documentation submitted by defendants, the decedent was treated by defendants from December 1992, to May 1996. On July 26, 1996, the decedent began treatment with another physician due to a move from the area. Pursuant to MCL 600.5805(6), the plaintiff had two years to file the medical malpractice action. The claim of medical malpractice accrued "at the time of the act or omission that is the basis for the claim of medical malpractice regardless of the time of the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). We note that plaintiff does not dispute that the risk factors for coronary artery disease, smoking, drinking, hypertension, and family history, were present at the commencement of treatment in December 1992. Indeed, there is evidence in the medical records that the decedent reported his consumption of alcohol and cigarettes, that he was given medication for hypertension, and that defendants were aware of these risk factors.

In the present case, plaintiff alleges, without citation to authority, that each visit to defendants' office constituted a new act of medical malpractice. The last treatment rule provided that a claim of malpractice accrued at the time the defendant discontinued treating or serving the plaintiff. *Chase v Sabin*, 445 Mich 190, 198 n 4; 516 NW2d 60 (1994). However, the Legislature repealed the last treatment rule. *Morgan v Taylor*, 434 Mich 180, 194; 451 NW2d

852 (1990). A challenge alleging ongoing deficiencies or omissions in diagnosis do not constitute separate acts or omissions that represent new accrual dates. *McKiney v Clayman*, 237 Mich App 198, 202-204; 602 NW2d 612 (1999). A continuing wrong or continuing treatment rule would operate to reinstate the last treatment rule abrogated by the Legislature. *Id*. at 208. Additionally, the continuing violations doctrine creates an exception to the statute of limitations in employment cases where an employee challenges a serious of discriminatory acts sufficiently related that they create a pattern of acts that do not fall completely within the limitation period. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 528; 398 NW2d 368 (1986). However, Michigan courts have failed to extend the continuing violations doctrine to negligence or malpractice actions. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 341; 568 NW2d 847 (1997). Accordingly, plaintiff's contention, that each visit to defendants' offices constituted a new claim of medical malpractice, is not supported by our review of authority. Rather, for purposes of the two-year statute of limitation, the claim accrued at the time of the act or omission in December 1992. Accordingly, plaintiff could not maintain this cause of action based on the two-year statute of limitation.

Alternatively, plaintiff conclusively alleges that the medical malpractice by defendants could not have been discovered before the date of death, July 3, 1999. However, the burden of proof rests with plaintiff to demonstrate, based on objective facts, that he could not have discovered nor should have discovered the existence of the claim at least six months before the expiration of the period. Review of the medical records submitted by defendants reveals that, when the decedent was treated by Dr. Clouse, a cardiac stress test was ordered on October 2, 1998, eight months before his death. Consequently, the decedent *should* have known eight months prior to his death of the existence of the coronary artery disease that plaintiff alleges went undiagnosed for years. Accordingly, summary disposition based on the six-month discovery rule was appropriate.

Moreover, when examining the statute of repose, summary disposition in favor of defendants was proper. Again, MCL 600.5838a(2) provides in relevant part:

> (2) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 or 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. … [MCL 600.5838a(2).]

Terms that are not defined in a statute must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). "Except" is defined as "with the exclusion of; excluding; save; but … only; with the exception … otherwise than; …" Random House Webster's College Dictionary (2d ed), p 459. "However" is defined as "in spite of that" and "on the other hand." *Halloran, supra* quoting Random House Webster's College Dictionary. "The making of exceptions to the general provisions of a statute, and modifications of the general plan thereof, is a commonly recognized function of a proviso." *People v Wolfe*, 338 Mich 525, 536; 61 NW2d 767 (1953). "Statutory exceptions are to be given a limited, rather than expansive construction." *Rzepka v Farm Estates, Inc*, 83 Mich App 702, 706-707; 269 NW2d 270 (1978). When construing an

exception to statutory language, care must be taken not to stray from the statutory language to the extent that its intent and purpose may be undermined. See *Vargo v Svitchan*, 100 Mich App 809, 823; 301 NW2d 1 (1980).

Thus, based on the plain language of MCL 600.5838a(2), a claim based on medical malpractice may be brought within two years of the act or omission, MCL 600.5805(6), or within six months after the plaintiff discovered or should have discovered the existence of the claim. MCL 600.5838a(2). In addition to the statute of limitation, MCL 600.5838a(2) also contains a statute of repose. *Sills, supra*. The statute of repose provides: "However, … the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. …" MCL 600.5838a(2). Stated otherwise, irrespective of the two-year malpractice limitation or the six-month discovery rule, a claim for medical malpractice cannot be commenced more than six years after the date of the act or omission that serves as the underlying foundation for the medical malpractice action.

Applying the above stated statute to the facts and our defendants, the cause of action was filed after the statute of limitations expired and outside the statute of repose. The alleged act or omission that caused the decedent's injury was the failure to diagnose his coronary artery disease where the risk factors for the disease were present. These factors were present in December 1992, when defendants treated the decedent. Applying the six-year statute of repose to the facts of this case, the statute of repose ended in December 1998. Accordingly, the trial court properly dismissed the complaint against these defendants.

We note that the statute of repose contains exceptions as set forth in MCL 600.5851. See MCL 600.5838a(2). However, those exceptions apply to injuries to persons eight years old or less, MCL 600.5851(7), or individuals thirteen years old or less, MCL 600.5851(8). Exceptions must be examined to provide a limited, rather than broad construction. *Rzepka, supra*. Consequently, applying the plain language, *Neal, supra*, to the limited construction, there is no basis to expand these limitations to the circumstances involving the decedent, an adult male.

We note also that plaintiff alleges an issue not decided by the trial court. Specifically, plaintiff alleges that her litigation may be pursued on the basis of MCL 600.5852. Because this issue presents a question of law for which all necessary facts are available, we will address it. *ISB, supra* at 533 n 7. MCL 600.5852 provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

MCL 600.5852 is a saving statute, not a statute of limitations, and it is designed to preserve actions that survive death such that the personal representative of the estate is given a reasonable time to pursue an action. *Miller v Mercy Memorial Hosp Corp*, 466 Mich 196, 202-203; 644 NW2d 730 (2002).

In the present case, this action does not present the circumstances where the litigation survived the decedent's passing. We note that MCL 600.5852 begins with a limitation or contingency; it is invoked *if* a person dies *before* the period of limitations has run *or* within 30 days after the period of limitations has run. See *ISB, supra* at 529. In the present case and with regard to our defendants,[1] the decedent did not die before the period of limitations had run or within 30 days of the expiration of the period. The two-year statute of limitations commenced in December 1992, when all risk factors for coronary artery disease existed, and the period ended in December 1994. With regard to the six-month discovery rule, the plaintiff failed to present proofs regarding when the decedent knew or should have known of the existence of the claim. However, at least eight months prior to the death, a cardiac stress test had been ordered. Consequently, plaintiff's blanket assertion that the six-month discovery period began at the time of death and the subsequent reliance on MCL 600.5852 to commence this litigation in a timely manner is without merit. Accordingly, the dismissal of the complaint was proper.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[1] We reach no opinion with regard to any claim against the subsequent medical provider, Dr. Clouse.